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No. 92-1700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GERTRUDE BAUMGART, et al.,

Petitioners,

—v.—

FAIRCHILD AIRCRAFT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S BRIEF IN REPLY

Petitioners Gertrude Baumgart, et al., respectfully submit this reply brief.

Respondent's brief in opposition mischaracterizes and fails to address the central issue which merits this Court's review, namely, whether federal bankruptcy provisions grant the district court only two options for removed bankruptcy-related death actions: trial in federal district court under 28 U.S.C. § 157(b)(5) or abstention with remand to preserve federal-state comity under 28 U.S.C. §§ 1334(c)(1) and 1452(b).

The *forum non conveniens* dismissal below violated the jurisdictional scheme established by these bankruptcy statutes.

To achieve the primary goal of a single federal bankruptcy forum, Congress provided for automatic removal of all bankruptcy-related actions, 28 U.S.C. § 1452(a), and expressly mandated trial of bankruptcy-related death and injury actions in the district court where the bankruptcy is pending or where

the claim arose under 28 U.S.C. § 157(b)(5). *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir. 1987); *A.H. Robins v. Piccinin*, 788 F.2d 994, 1101 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986).

Competing with this "single forum" goal was a serious Congressional concern for "comity between Federal and State courts", 130 Cong. Rec. S7157 (June 19, 1984) (Sen. Dole), which prompted Congress to temper the broad bankruptcy jurisdiction with statutory abstention and remand under 28 U.S.C. §§ 1334(c)(1) and 1452(b). Under this Congressional compromise, abstention or trial in federal court are the only options. 130 Cong. Rec. S8890 (June 29, 1984) (Sen. Dole).

Fairchild attempts to avoid the mandatory language of 28 U.S.C. § 157(b)(5) by arguing that the statute does not expressly abrogate *forum non conveniens*. But, Fairchild ignores that *forum non conveniens* dismissal is inherently repugnant to Fairchild's invocation of federal jurisdiction based on its own bankruptcy filing. There was no need for Congress expressly to consider *forum non conveniens*, because jurisdiction over bankruptcy-related state death and injury actions exists at the request of and for the sake of the *debtor* to provide a single forum for the protection of its estate.

In *United States v. National City Lines, Inc.*, 334 U.S. 573, 596-97 (1948), this Court held that *forum non conveniens* was inapplicable in antitrust cases, despite the fact that the relevant venue statute did not expressly bar *forum non conveniens* dismissal. This Court found that the grant of federal jurisdiction to hear certain cases can preclude application of the *forum non conveniens* doctrine. *Id.* Such is the case here.

Contrary to Fairchild's claims, a clear conflict exists between the decision below and *In re Pan American Corp.*, 950 F.2d 839 (2d Cir. 1991), *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985) and *Piccinin*, 788 F.2d 994. These cases defined the power of the federal court seized of a bankruptcy proceeding to determine the proper forum to adjudicate

bankruptcy-related death and injury actions. The Second, Fourth and Sixth Circuits plainly held that Section 157(b)(5) mandates federal district court adjudication of such bankruptcy-related death and injury actions, with one statutory exception, abstention under Section 1334. *In re White Motor Credit*, 761 F.2d at 273, *In re Pan American Corp.*, 950 F.2d at 844; *Piccinin*, 788 F.2d at 1010-11.

Fairchild mischaracterizes Petitioners' argument when it claims Petitioners seek appellate review of the district court's July 1990 order, which denied abstention and remand, and pursuant to 28 U.S.C. § 157(b)(5) ordered "that the wrongful death claims shall be tried in the district court for the district in which the bankruptcy case is pending. . . ." *See* Respondent's App. 51a. This decision conformed with the Court's statutory options: (1) abstention and remand under Section 1334 and Section 1452 or (2) trial in federal court under Section 157(b)(5).[1]

Petitioners' appeal is from the later order (entered by a different district court judge) which granted *forum non conveniens* dismissal *without ever having addressed* Petitioners' legal argument that the bankruptcy statutes prohibit such dismissal and only permit trial in federal court or abstention and remand to state court.

This Court has jurisdiction over this appeal concerning the proper construction of the bankruptcy statutes and the principles of federalism and comity incorporated therein.

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1 Fairchild errs in suggesting to this Court that there is unanimous agreement that no appeal ever lies from a decision not to abstain under Section 1334(c)(1). The circuits are in disagreement on this. *See e.g., In re Pan American Corp.*, 950 F.2d at 843-844 (allowing appeal); *In re Eastport Associates*, 935 F.2d 1071, 1075 (9th Cir. 1991) (allowing appeal); *In re Ben Cooper, Inc.*, 924 F.2d 36, 38 (2d Cir. 1991) (allowing appeal); *Matter of Howe*, 913 F.2d 1138, 1143 (5th Cir. 1990) (allowing appeal); *but see, In re Adams*, 809 F.2d 1187, 1188 (5th Cir. 1987) (disallowing appeal).

Fairchild claims, inappositely, that no federal-state conflict exists in that the federal courts may apply federal law to a *forum non conveniens* dismissal motion. But, Petitioners claim that a federal-state conflict exists because the *forum non conveniens* dismissal below was inconsistent with the exercise of federal bankruptcy jurisdiction over a removed state death action. If bankruptcy jurisdiction is no longer needed because defendant's status as a debtor has been resolved, the very nature of the court's jurisdiction, which exists solely due to the defendant's status as a debtor, requires that it abstain and remand in deference to the state court.

Finally, Fairchild errs in stating that abstention with remand is unavailable in a removed bankruptcy-related state death action. Fairchild ignores that this case does not involve *Younger* abstention, but rather express statutory abstention designed to advance federal-state comity.[2] Under the bankruptcy laws, remand and abstention work together. The removal statute, 28 U.S.C. § 1452, expressly incorporates 28 U.S.C. § 1334, the bankruptcy jurisdiction and abstention statute, demonstrating the necessary interrelationship of the two. *See e.g., In re Adams*, 809 F.2d 1187 (5th Cir. 1987) (involving abstention in a removed state case with remand to state court).

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), this Court explained the relationship between abstention and remand. The Court held that a district court which relinquishes federal jurisdiction over a removed case has the inherent power and discretion to remand the case to state court. *Id.* at 351. Here that power was established by statute and is the only exception to the mandatory requirement of Section

2 Fairchild cites *Akenbrandt v. Richards*, 112 S.Ct. 2206, 2216 (1992). But *Ankenbrandt* is not a statutory abstention case and Fairchild omits relevant language from the referenced quote. This Court stated: "we have never applied the notions of comity so critical to Younger's "Our Federalism" when no state proceeding was pending nor any assertion of important state interests made."

157(b)(5) of trial in federal court. When the district court below relinquished bankruptcy jurisdiction over these removed state claims, its only recourse was to abstain and remand to Texas State Court.

CONCLUSION

For the reasons stated in Petitioners' Brief and in this Reply, it is respectfully requested that certiorari be granted to review the decision below.

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Respectfully submitted,

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